30

AFR

HIGH COURT OF CHHATTISGARH AT BILASPUR

First Appeal No. 140 / 2003

Chetan Bharti

Vs.

Premlal Dewangan

Post for Judgment: 10.04.2007

Sd/-
Dilip Raosaheb Deshmukh
Judge
10.04.2007

(31)

A.F.R.

HIGH COURT OF CHHATTISGARH AT BILASPUR

Before: Hon'ble Shri Justice Dilip Raosaheb Deshmukh

First Appeal No.140/2006

APPELLANT DEFENDANT : Chetan Bharti, son of Shri Sukalchand Bharthari, aged about 46 years, Constable, R/o Mamta Nagar, Tulsipur, Tahsil and District Rajnandgaon (C.G.)

Versus

RESPONDENT PLAINTIFF : Premlal Dewangan, aged about 43 years, son of Shri Babulal Dewangan, Proprietor - Dewangan General Store, Mamta Nagar, Tulsipur, Tahsil and District Rajnandgaon (C.G.)

Shri Abhishek Verma, Counsel for the appellant/defendant.
Shri V.K.Sharma, Counsel for the respondent/plaintiff

JUDGMENT

(Delivered on this 10th day of April, 2007)

This appeal is directed against the judgment and decree dated 3.7.2006 passed by 1st Additional District Judge, Rajnandgaon in Civil Suit No. 48-A of 2003 whereby while refusing to grant a decree for specific performance of contract dated 3.9.2002 in favour of the respondent/plaintiff, it ordered refund of advance of Rs.70,000/- to the respondent/plaintiff which included interest of Rs.6,300/- and costs of goods purchased worth Rs.3,700/- by the defendant on credit from the plaintiff.

2. The respondent/plaintiff filed a Civil Suit No. 48-A of 2003 for specific performance of contract dated 3.9.2002 for sale of the suit house by the defendant. It was alleged that on 3.9.2002 the defendant agreed to sell the suit house to the plaintiff and received an advance of Rs.60,000/-. The *Ekrarnama* was executed by the respondent/defendant acknowledging receipt of Rs.60,000/-. It was mentioned in the agreement that if the appellant/defendant could not make arrangement for money within next 15 months, he would refund the amount of Rs.60,000/- to the respondent/plaintiff. The plaintiff prayed for a decree for specific performance of contract and in the alternative prayed for refund of advance of Rs.60,000/- with interest of Rs.6,300/- thereon and also the amount of Rs.3,700/- towards articles purchased on credit by the defendant from the shop of the plaintiff.

3. The appellant/defendant while denying the claim in *toto* pleaded that he did not receive any amount from the respondent/plaintiff and also did not execute any *Ekrarnama.*

4. On the basis of the wholly unrebutted evidence led by the plaintiff, the learned trial Judge recorded a finding that the execution of the *Ekrarnama* by the defendant on 3.9.2002 and receipt of Rs.60,000/- from the plaintiff by the defendant, as also purchase of articles worth Rs.3,700/- on credit by the defendant from the plaintiff was proved. However, on the basis of the clear endorsement in the agreement dated 3.9.2002 that if the defendant could not arrange for money within 15 months, he would refund the amount of Rs.60,000/- to the plaintiff, the lower Court came to the conclusion that the transaction between the parties was a loan transaction and

(33)

on this ground refused to grant specific performance of the contract while granting a decree in favour of the plaintiff for refund of consideration of Rs.60,000/- with interest Rs.6,300/- and the amount of Rs.3,700/- towards cost of articles purchased by the defendant on credit.

5. The respondent/plaintiff did not prefer any appeal against the judgment and decree passed by the Court below.

6. The only ground urged by the learned counsel for the appellant/defendant in this appeal is that once the Court came to the conclusion that the defendant had not agreed to sell the suit house to the plaintiff for a consideration of Rs.70,000/- on 3.9.2002 and the transaction between the parties was a loan transaction, it had no jurisdiction to order refund of Rs.70,000/- to the plaintiff from the defendant. On the other hand, the learned counsel for the respondent/plaintiff argued in support of the impugned judgment and decree while placing reliance on *Suresh Chandra v. Satya Narayan* **2004 (1) M.P.H.T 238** wherein under similar circumstances refund of advance paid by the plaintiff to the defendant was held to be justified.

7. Having heard the rival contentions, I am of the considered opinion that this appeal has no merit and is liable to be dismissed. The evidence led by the respondent/plaintiff regarding execution of the agreement dated 3.9.2002 by the defendant and receipt of an amount of Rs.60,000/- as also purchase of articles worth 3,700/- on credit was wholly unrebutted since the witnesses were not cross-examined by the defendant. The execution of the *Ekrarnama* Ex.P.1 by the

(34)

defendant and the receipt of Rs.60,000/- as also goods worth Rs.3,700/- on credit by the defendant was thus fully established. The only fact which weighed heavily with the lower Court in refusing to grant specific performance of contract was the endorsement at the bottom of the *Ekrarnama,* which is as under:

> *"मेरे द्वारा 15 माह का समय लिया जा रहा है ताकि, इस अवधि में मैं यदि रकम की व्यवस्था कर लिया तो यह 60,000/- रू. की रकम प्रस्तावित केता को वापस कर दी जावेंगी तथा यह इकरारनामा केवल रकम की सीमा तक प्रभावशील होगा ।"*

8. The Court below held that the above note clearly revealed that in fact an amount of Rs.60,000/- was advanced by the plaintiff to the defendant which was to be refunded within a period of 15 months and in fact there was no contract for sale of the suit house. In this manner, although the Court came to the conclusion that the defendant had executed the agreement Ex.P.1 which had the recital of sale of suit house for Rs.70,000/- and had received the amount of Rs.60,000/- from the plaintiff and further that the defendant had also purchased articles worth Rs.3,700/- from the plaintiff on credit, it was wholly justified in refusing to grant specific performance of the contract on the basis of the recital in the footnote of Ex.P.1 and granting a decree only for refund of Rs.60,000/- along with interest claimed i.e. Rs.6,300/- and the cost of articles purchased on credit by the plaintiff i.e. Rs.3,700/- in total Rs.70,000/-.

9. Section 20 of the Specific Relief Act reads as under:

> **"20. Discretion as to decreeing specific performance.---**
> (1) The jurisdiction to decree specific performance is discretionary, and the court is not bound to grant such

(35)

relief merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal.

(2) The following are cases in which the court may properly exercise discretion not to decree specific performance:---

(a) where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant; or

(b) where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas it non-performance would involve no such hardship on the plaintiff; or

(c) where the defendant entered into the contract under circumstances which though not rendering the contract voidable, makes it inequitable to enforce specific performance.

Explanation 1.--- Mere inadequacy of consideration, or the mere fact that the contract is onerous to the defendant or improvident in its nature, shall not be deemed to constitute an unfair advantage within the meaning of clause (a) or hardship within the meaning of clause (b).

Explanation 2.--- The question whether the performance of a contract would involve hardship on the defendant within the meaning of clause (b) shall, except in cases where the hardship has resulted from any act of the plaintiff subsequent to the contract, be determined with reference to the circumstances existing at the time of the contract.

(3) The court may properly exercise discretion to decree specific performance in any case where the

(36)

plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

(4) The court shall not refuse to any party specific performance of a contract merely on the ground that the contract is not enforceable at the instance of the party.

Grant of relief for specific performance of contract is thus wholly discretionary. In the facts and circumstances, clause (c) of sub-section (2) of Section 20 gets attracted and the Court below was wholly justified in refusing to grant the relief for specific performance of contract dated 3.9.2002.

10. Section 22 of the Specific Relief act reads as under:

22. Power to grant relief for possession, partition, refund of earnest money etc.--- (1) Notwithstanding anything to the contrary contained in the Code of Civil Procedure, 1908 (5 of 1908), any person suing for the specific performance of a contract for the transfer of immovable property may, in an appropriate case, ask for—

(a) possession, or partition and separate possession, of the property, in addition such performance; or

(b) any other relief to which he may be entitled, including the refund of any earnest money or deposit paid or [made by] him, in case his claim for specific performance is refused.

(2) No relief under clause (a) or clause (b) of sub-section (1) shall be granted by the court unless it has been specifically claimed:

Provided that where the plaintiff has not claimed any such relief in the plaint, the court shall, at any stage of the proceeding, allow him to amend the plaint on such terms as may be just for including a claim for such relief.

(37)

(3) The power of the court to grant relief under clause (b) of sub-section (1) shall be without prejudice to its powers to award compensation under section 21.

11. Once the execution of *Ekrarnama* by the defendant and the receipt of amount of Rs.60,000/- towards advance by the defendant from the plaintiff was proved, the Court had jurisdiction to order refund of the money paid by the plaintiff to the defendant under Section 22 (1) (b) of the Specific Relief Act, 1963. It is to be noticed that the plaintiff had also prayed for the relief of the refund of Rs.70,000/- from the defendant in the plaint. In this manner, instead of driving the plaintiff to file another suit, the Court below had jurisdiction to grant the relief of refund of amount paid by the plaintiff to the defendant at the time of execution of the document Ex.P.1, under sub-clause (2) of Section 22 of the Specific Relief Act and also for the cost of Rs.3,700/- towards articles purchased by the defendant from the plaintiff on credit.

12. In the result, there is no merit in this appeal which is accordingly dismissed. There shall be no order as to costs.

Sd/-
Dilip Raosaheb Deshmukh
Judge

Anjani